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Attention: Jennifer J. Johnson
Secretary, Board of Governors
of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Re: Docket No. R-1170
Proposed Rule Changes to Regulation M and Staff Commentary
(Changes to definition of "clear and conspicuous" disclosures)

Ladies and Gentlemen:

Wells Fargo & Company and its affiliates ("Wells Fargo"), including Wells Fargo Bank, N.A., Wells Fargo Home Mortgage, Inc. and Wells Fargo Financial, Inc., appreciate the opportunity to comment on the proposed rule and staff commentary regarding a uniform standard for "clear and conspicuous" disclosures under Regulation M (and Regulations B, E, DD, and Z). Wells Fargo is a financial services company that owns and operates national banks in 23 Western and Midwestern states, the nation's leading retail mortgage lender, and one of the nation's leading finance companies.

PROPOSED UNIFORM *STANDARD* FOR "CLEAR AND CONSPICUOUS' DISCLOSURES

The Board proposes a uniform standard for "clear and conspicuous'' disclosures under Regulations B, E, M, Z, and DD, The purpose of the proposal is twofold: to help ensure that consumers receive *noticeable* and ***understandable*** information required by law in connection with obtaining consumer financial products and services; and to help facilitate compliance through consistency among these five regulations. Although the ostensible benefits of consistency by means of a suitable uniform standard for ***noticeable*** and *understandable* information may help facilitate compliance in some respects, we question whether a uniform standard is needed or appropriate in light of the different enabling statutes and the different purposes, considerations, and concerns of the respective disclosures required under each of those statutes,

Our greatest concern, however, is with the proposed standard itself: "Cleat and conspicuous means that the disclosure is reasonably understandable and designed to call attention to the nature and significance of the information in the disclosure." We find the first component of this proposed standard – "reasonably understandable" (clear) – to be acceptable, but we ***are*** greatly troubled by the second component of the proposed standard – "designed to call attention to the nature and significance of the information in

the disclosure" (conspicuous). While the first component appears to be appropriate and consistent with the stated purpose of the new proposal that consumers receive ***understandable*** information, the second component goes well beyond the stated purpose of the new proposal that consumers receive ***noticeable*** information.

The Second Component of the Proposed Standard Is Inappropriate, Provides No meaningful Benefit to Consumers, and Is Unworkable and Risky to Financial Institutions

We do not support the second component of the proposed clear and conspicuous standard, which requires that the disclosure must be "designed to call attention to the nature and significance of the infomation in the disclosure." The proposal to impose this highly subjective higher standard for disclosures is inappropriate, provides no meaningful benefit to consumers, and is unworkable for financial institutions,

The Second Component Is Inappropriate

This second component of the definition is drawn from the higher standard applicable to privacy notices – which address pervasive information sharing and security practices. Regulation P §216.3(b). The Supplementary Information for the Final Privacy Rule notes that "[t]he Agencies recognize that the proposed definition develops the concept of 'clear and conspicuous' beyond what is currently understood by the term."[1]

Privacy notices address comprehensive information sharing and security practices of an entity; privacy notices can (and should) stand on their own in a separate notice or in a discrete separate section of a combined document. Regulation M disclosures however, pertain to one particular product – consumer leases – and *are* intended to explain to consumers, no matter &om whom the product is eventually purchased, the components of that product as well as give consumers a basis for comparing the relative merits of those components between leases offered by different companies. In addition, Regulation M disclosures are rarely, if ever, given in a separate discreet statement. These disclosures are most frequently integrated into advertisements and lease contracts; along with product descriptions, contract terms and other state and/or federally required notices and disclosures. While Regulation P disclosures are based on a particular entity's general privacy policy and practices, Regulation M disclosures are derived from one specific consumer product offered by the entity.

The second component is also inappropriate for Regulation M because Regulation M was recently revised in its entirety. In 1993 the Federal Reserve Board published an Advance Notice of Proposed Rulemaking which eventually led to the release of the Final Rule in September 1996 (61 Fed. Reg. 52246, October 7, 1996). The current content of Regulation M including the Model Forms are a result of a lengthy revision process by the staff of the division of Consumer and Community Affairs of the Federal Reserve Board

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[1] Supplementary Information Section III.b. to Final Privacy Rule issued jointly by the banking agencies on June 1, 2000.

with extensive input from consumer groups, the various entities that compose the consumer leasing industry and representatives from states' Attorney General offices and other consumer-oriented state agencies. The staff paid particular attention to the "clear and conspicuous" standard as it related to the actual content of the Regulation M disclosures as well as how those disclosures should appear in relation to contract and advertising terms and other state and federally required notices and disclosures. The current version of Regulation M conforms to that standard by requiring that certain specified disclosures be made together and segregated from other information.[2] In addition, Regulation M provides that other information may be provided with the non-segregated disclosures[3], giving lessors the flexibility to place those disclosures with contract terms that relate to the disclosures. Regulation M is now thoughtfully and carefully drafted; it aids consumers in understanding both leasing terms and their significance in a particular company's lease product. There is no need to impose an allegedly higher standard where the existing standard is performing as intended under the enabling statute.

As an example of how changing the standard would defeat the purpose of providing clear and conspicuous disclosures, please consider Wells Fargo's Express Auto Lease Agreement that is used for consumer vehicle lease transactions in California. Our recently revised document was drafted to comply, in particular, with the requirements of the California Vehicle Leasing Act ("VLA") and Regulation M. *It is 24 inches long*. It has to be this length to comply with the VLA requirement that the entire lease contract, including lease terms, applicable state law disclosures and Regulation M disclosures, be contained in a single document. Also, some of the VLA disclosures must appear in 12-point boldface type or be "circumscribed by a line"[4].

To call attention to a particular disclosure implies, necessarily, that the disclosure must stand out in some fashion. Making Regulation M disclosures stand out would be extremely difficult – if not impossible or impractical – in conjunction with the disclosures required by the VLA. The only way that we could be assured of calling attention to the Regulation M disclosures would be to make them standout in, say, 14-point red boldface type or 16-point boldface type. This would result in our California lease agreement containing several different levels of disclosures on an impossibly long, single paper form. Vendors have told us that we have reached the maximum document length that can be used by the vast majority of California vehicle dealers' computers. Therefore, the proposed standard could make it difficult, and probably impossible, to offer our lease product in California.

A different problem would arise in calling attention to Regulation M disclosures vis-à-vis other "clear and conspicuous" disclosures, The federal Fair Credit Reporting Act (FCRA), for example, requires institutions to provide certain "clear and conspicuous" disclosures in various situations – such as certain affiliate sharing disclosures, firm offer of credit solicitation disclosures, and addresses for reporting inaccuracies – but not under

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[2] 12 CFR 213.3 (a)(2)
[3] 12 CFR 213.3 (b)
[4] California Civil Code § 2985.8(d)

a higher standard[5], Illinois and New Yorlc are states that have clear and conspicuous standards for particular motor vehicle lease disclosures[6]. For example, the following must be printed in "a conspicuous manner" in an Illinois lease: 'NO PHYSICAL DAMAGE OR LIABILITY INSURANCE COVERAGE FOR BODILY INJURY OR PROPERTY DAMAGE CAUSED TO OTHERS IS INCLUDED IN THIS LEASE."[7]. If the proposed standard for Regulation M is adopted, it would be difficult, if not impossible, to provide discloswes under different laws or regulations with different standards on the same page. The financial institution would need to *call attention* to the Regulation M disclosures, making them stand out (in some fashion) from the FCRA or state law disclosures, which would have the effect of making the FCRA or state law disclosures less conspicuous.

The proposed standard (when read in conjunction with the proposed examples in the Staff Commentary) would create at least four separate levels of "conspicuous" disclosures:

(1) ***Regular Contract Provisions*** – least conspicuous;

(2) ***State Disclosures and Certain Federal Disclosures (e.g. FCRA)*** – conspicuous, but conspicuous in a way different than Regulation M disclosures;

(3) ***Regulation M (and Regulation B, E, DD, or Z) Disclosures*** – more conspicuous than (1), different than (2), and less conspicuous than (4) and (5);

(4) ***"Key words" in Regulation M (and Regulation B, E, DD, or Z) Disclosures*** – more conspicuous than (1) - (3) but less conspicuous than (5) [See Proposed Staff Commentary – under "2. Designed to call attention." example iv. "use boldface or italics for key words."];

These four arbitrary (but different) levels of disclosure are not only inappropriate, but they are also manageable.

The Second Component Would Provide No Meaningful Benefit to Consumers

The second component of the proposed standard also would provide no meaningful benefit to consumers. Everyone would agree that disclosures under these five regulations should be noticeable and not inconspicuous, but a higher standard for these lengthy disclosures would provide no meaningful benefit to consumers. The higher "clear and conspicuous" standard for lengthy privacy disclosures has done little, if anything, to enhance consumer awareness of the content in privacy disclosures or make

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[5] FCRA §603(d)(2)(A)(iii); §615((d)(1); §623(a)(1)(C).
[6] 815 ILCS 636/10.35; NY PERS PROP §331(10)
[7] 815 ILCS 636/25 (b)(2)

them more meaningful in any respect. See Interagency Proposal to Consider Alternative Forms of Privacy Notices under the Gramm-Leach-Bliley Act. 68 Fed. Reg. 75,164 (December 30, 2003).[8]

Information overload (rather than lack of conspicuousness) is the primary concern of consumers with respect to disclosures. The proposed higher standard for Regulation M disclosures would, in effect, require additional pages, rearranging text, printing larger type sizes, and various other ill-defined steps to assure that the institution has adequately called attention to the lengthy regulatory disclosures. These steps would inevitably further increase information overload for consumers and make disclosures even more complex,

The Comptroller of the Currency, John Hawke, Jr,, recently observed that:

> "In the mid-1970's . . . a study was performed that focused on 'information overload' – the concern that TILA disclosures were so extensive that they actually interfered with the ability of consumers to get information they really needed. These concerns gave rise to the Truth in Lending Simplification Act of 1980. Significantly, the Simplification Act took up more pages in the statute books than Congress needed when it enacted TILA in the first place. Suffice it to say, this well-intentioned effort did not result in a more effective, less costly disclosure regime. [Only in passing did a more recent 1996 Federal Reserve and HUD study of TILA/RESPA touch] upon what may be a more fundamental flaw in the existing TILA/RESPA disclosures – their sheer oppressive weight, their inscrutability, the confusion .or cynicism they engender among consumers to whom they are given, Nor did the study come to grips with a *critical* basic question – a question that could be raised about almost all compliance regulation, *Are* the benefits being delivered to consumers worth the costs being imposed on the industry?"[9]

In the case of the proposed higher standard for Regulation M disclosures, no meaningful benefits would be delivered to consumers, but significant costs and burdens would be imposed on financial institutions.

The Second Component Is Unworkable and Risky for Financial Institutions

Attempting to meet the higher standard, as proposed, is unworkable and risky for financial institutions. If the Regulation M proposal is adopted, as a threshold matter

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[8] The joint banking agencies have implicitly recognized that the higher standard for lengthy Regulation P disclosures has not achieved its intended purpose to make privacy notices more readable and useful to consumers. The Agencies are now considering how to improve the readability and usefulness of privacy notices in light of concerns expressed by financial institutions, consumers, privacy advocates, and members of Congress dike Bout complex and lengthy privacy notices. "The primary matter the Agencies we now considering is whether to develop a model privacy notice that would bc short and simple." See Interagency Proposal to Consider Alternative Forms of Privacy Notices under the Gramm-Leach-Bliley Act. 68 Fed. Reg. 75,164 (December 30,2003).

[9] Remarks by John D. Hawke, Jr., Comptroller of the Currency, before the Independent Community Bankers of America, Orlando, Florida, March 4,2003.

institutions would need to undertake a comprehensive review of each and every advertising brochure, printed credit document, online page, kiosk display, ATM screen, and other means of disclosure. They then would need to revise them to assure that the higher standard was met for disclosures under these five regulations in every context (for Regulation M, this includes advertising and lease contract disclosures) To protect against potential liability, institutions would need to act cautiously and judiciously by widening margins, increasing type sizes, adding new pages, and making numerous other changes out of an abundance of caution, all of which would result in more paper, longer online pages, additional programming costs, and other significant burdens and costs.

Even once an institution implemented changes, however, it could not be assured that it had met the highly subjective and overly complex higher standard for Regulation M disclosures. The proposed changes to the Staff Commentary (discussed in detail below) would create unclear and unsettled guidelines that provide little, if any, guidance in a variety of situations, such as electronic disclosures that are commonplace in television, radio, ATM terminals, and online advertising. Because consumers have a private right of action under the Truth in Lending Act for many types of violations, the potential for liability in this unclear and unsettled area is enormous. (Title V of the Gramm-Leach-Bliley Act and Regulation P, from which the proposed higher standards for Regulation Z disclosures are drawn, do not allow for a private right of action.) Different courts would read and apply this higher standard in different ways, potentially resulting in large class action awards against financial institutions.

As a final point, the Board indicates that no increase in burden would accompany the proposed uniform standard. In fact, nothing could be further from the truth. Not only would the new, higher standard disclosures result in more paper, longer online pages, additional programming costs, and other significant implementation expenses, but institutions would need to discard or destroy large quantities of existing forms and materials. As mentioned above, in California Wells Fargo might be forced to totally restructure our consumer motor vehicle lease product in order to provide documents that comply with the higher standard. The increase in burden and expense would be enormous.

Proposed Standard Should Not Be Adopted (Any Uniform Standard Must Be Flexible)

While we appreciate the goal of the Board in seeking to establish a uniform standard for providing required disclosures under Regulations €3, E, M, Z, and DD, the proposed standard should not be adopted for the reasons set forth above. The rigid higher standard fails to provide the flexibility needed to address the variety and complexity of disclosures required under Regulation M (as well as the other four regulation's).

We question the need for any uniform standard but recommend that the Board look at a more flexible approach if it decides to consider this matter further. One alternative, if the Board decides to consider this matter further, is a *noticeable* and ***understandable*** standard: "Clear and conspicuous means that the disclosure is reasonably

understandable and noticeablq." Such an alternative is more consistent with the stated purpose set forth in the SUMMARY Section of this proposal: "These revisions are intended to help ensure that consumers receive ***noticeable*** **and** ***understandable*** information that is required by law in connection with obtaining consumer financial products and services."

A "noticeable" standard (in place of "designed to call attention to the nature and significance of the information in the disclosure" standard) would seem to provide a meaningful, yet more flexible, uniform standard that may be suitable for the different purposes, considerations, and concerns addressed by the different enabling statutes for the five regulations. A "noticeable" standard is used in the Uniform Consumer Credit Code (UCCC), which defines a disclosure as ***conspicuous*** "when it is so written that a reasonable person against whom it is to operate ought to have ***noticed*** it." The term "noticeable" also is closer to the meaning of the term "conspicuous" in ordinary usage: "easy to notice; obvious" ***The American Heritage Dictionary of the English Language, Fourth*** *Edition* (2000), published by Houghton Mifflin Company; "open to the view; obvious to the eye; easy to be seen" ***Webster's Revised Unabridged Dictionary*** (1998), published by MICRA, Inc.

If the Board decides to consider such an alternative standard, it should solicit further comments.

Specific Comments on Proposed Changes to Staff Commentary Regarding "Clear and Conspicuous" Standard

The proposed revisions to the Staff Commentary should not be adopted; but if the Board decides to consider this matter further under the more flexible standard set forth above (reasonably ***understandable*** and ***noticeable),*** the proposed Staff Commentary would require significant changes. We make these specific comments with respect to the proposed Staff Commentary:

Reasonably Understandable. The proposed rule generally uses examples of disclosures that are reasonably understandable; however, we point out the following:

- Wherever Possible, Three of the examples end with the phrase "wherever possible" instead of "wherever practicable." The term "possible" implies situations with even the most remote chance of probability; the term "practicable" emphasizes prudence, efficiency, and suitability. The phrase "wherever possible" should be replaced with "wherever practicable."

- Example v. This example emphasizes avoiding legal and highly technical business terminology; however, several Regulation M disclosures require the use of specific, technical phrasing or highly technical terms (e.g., the description of the method of determining an early termination charge – 213.4(g) uses specific,

technical phrasing). Given the complex nature of the required Regulation M disclosures, this example should be deleted.

Designed to Call. Attention, Consistent with our comments above, these examples should provide illustrations of disclosures that are ***noticeable*** rather than *designed to call attention,* The first part of the Staff Commentary under paragraph 2 of Section 213.2(9) should be revised to read:

"2. Noticeable. Disclosures must be easy to see and not buried in the text. Examples of disclosures that are noticeable include disclosures that are:"

With respect to the particular examples, we support the examples in the proposal as illustrative of ***noticeable*** disclosures with the following exceptions:

• Example ii. This example, as drafted, is so subjective that it provides virtually no guidance as to sufficient type size, except to create a safe harbor for type size that is 12-point type or greater. Institutions frequently use 8-point type in a variety of disclosures today, particularly with advertising disclosures. The use of 8-point type is widely accepted and provides a realistic, objective standard for disclosures. Accordingly, Example ii should be modified to read: "Use a typeface and type size that are easy to read. Disclosures in 8-point type generally meet this standard."

• Example iii. This example, as drafted, uses "wide margins" and "ample line spacing" as illustrations. Wide margins are irrelevant to the readability of text. The word "ample" means of large or great size, well beyond what is suitable for line spacing. Accordingly, Example iii should be modified to read: "Provide appropriate line spacing."

• Example iv. This example, as drafted, suggests that institutions "use boldface or italics for key words" to make them conspicuous. How is an institution to determine what is and is not a "key word" wider Regulation M? "Key word" is not defined in Regulation M or in the Truth In Lending Act, If an institution makes a stand-alone determination of which words *are* in fact, "key words", that decision could foster unnecessary litigation from parties that disagree with the institution's determination.

• Example v. This example, as drafted, is inappropriate for a ***noticeable*** standard (it uses the phrase "to call attention to the disclosures"). Accordingly, Example v should be modified to read: "In a document that combines disclosures with other information, use section headings or captions to make the disclosures noticeable."

Additional Comments on Proposed "Clear and Conspicuous" Standard

Two-year Transition Period. Because these proposed changes will require careful scrutiny and redrafting of all documents and electronic pages that contain disclosures, compliance with any new standards should be voluntary for a two-year period. This also will mitigate the unnecessary destruction of disclosure materials already printed or produced that may fail to comply with new standards. (New standards for *clear and conspicuous* disclosures should apply only to disclosures delivered after a mandatory compliance date following the two-year transition period.)

Thank you for the opportunity to comment on these proposed changes, We would be pleased to supplement our comments or to discuss any of them with you. Please contact the undersigned if you have any questions.

Sincerely,

John D. Wright

John D. Wright
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